

Auction Purchaser Is King: Supreme Court Upholds The Sanctity Of The Auction Process As Envisaged By The SARFAESI Act Over The Right To Redemption Of A Mortgagor

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In a recent decision^[i], the Hon'ble Supreme Court^[ii] ["SC"] has declared that the auction procedure laid down in section 13 (8) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ["the Act"] shall take precedence over a mortgagor's right to redemption^[iii] as included under section 60 of the Transfer of Property Act, 1882 ["the 1882 Act"]. In doing so, the SC has settled the apparent conflict between the two legislations.

The origin of this dispute starts from a credit facility of approximately Rs. 100 Crores provided by the Union Bank of India ["Bank"] to Bafna Motors (Mumbai) Pvt. Ltd. ["Borrower"]. A security was provided in the form of an immovable property situated in Thane, Maharashtra ["security"]. In the year 2022, the Borrower had been declared as a non – performing asset by the Bank with the dues amounting to approximately Rs. 123 Crores; subsequently, the Bank initiated auction proceedings as per the provisions of section 13 of the Act. The Borrower preferred an application for quashing of the aforesaid proceedings before the Debt Recovery Tribunal, Mumbai ["DRT"].

After 8 unsuccessful attempts at auctioning the security, the Bank was able to find a successful bidder who met the reserve price of Rs. 105 Crores in the form of Celir LLP ["Auction Purchaser"]. The sale procedure was, thus, initiated and the Auction Purchaser deposited close to 50% of the requisite auction money. To save its security from being sold, the Borrower preferred a Redemption Application^[iv] before the DRT. The DRT had reserved its order on the said application; however, apprehending the worst, the Borrower filed a writ petition under Article 226 of the Constitution before the Hon'ble Bombay High Court ["HC"] to protect its right to redemption.

The HC tendered a very practical – minded decision. Based on the undertakings given by the Borrower in court, the HC permitted the Borrower to exercise its right to redemption subject to payment of approximately Rs. 129 Crores, a figure slightly more than the total outstanding dues to the Bank. Naturally, if the Borrower was unable to do so, the sale would be confirmed in favour of the Auction Purchaser at the auction price itself. Aggrieved by the HC's decision, the Auction Purchaser approached the SC.

The analysis by the SC was on the following four main questions:

1. Whether the right to redemption of a mortgagor under section 60^[v] of the 1882 Act would subsist in light of the latest amendment to section 13 (8)^[vi] of the Act? Additionally, a decision of the Hon'ble Telangana High Court^[vii] had already considered such a question before. Hence, the validity of the same was also questioned as a corollary.
2. Whether the HC was justified in exercising its jurisdiction under Article 226 of the Constitution when the Borrowers possessed and had already exercised alternative remedy under the Act?
3. Whether the HC could have used equitable considerations to override the outcome envisaged by the statutory provisions of the Act?
4. Whether the right to redemption of a mortgagor stood extinguished on the publication of an auction notice?

The decision by the SC lucidly upholds the sanctity of the auction process as envisaged by section 13 (8) of the Act. In reaching at such a conclusion, the following was held.

First, the latest amendment of section 13 (8) of the Act^[viii] had clearly changed the position to the effect that now, the moment an auction is publicly noticed, the right to redemption of a borrower under the Act gets extinguished. Earlier, a secured creditor under the Act was barred from leasing or selling the security if the borrower tendered all its dues along with any costs, charges, and expenses incurred prior to the transfer by lease or sale. The SC, thus, declared that the present position drastically altered the time at which such right to redemption gets extinguished.

Second, the Act, being a special enactment, would take precedence over the general law prescribed under the 1882 Act.

Third, the intention behind the Act was for protection of security interests of creditors and not for achieving the highest possible sum which such creditor recovers by virtue of the enforcement of its security interest. In this regard, the auction purchasers are the most critical person for the scheme of the Act to function properly. If the practical approach adopted by the HC was to be allowed, then auction purchasers would be left at the mercy of the whims and fancies of secured creditors. This was certainly not to be allowed. *Fourth*, the jurisdiction under Article 226 could not have been exercised by the HC when alternative remedy exists and had already been exercised.

Fifth, the HC had used the principle of equity to arrive at its decision. In this regard, the SC declared that equity must always follow the law. In the present case, the law was clearly in favour of the Auction Purchaser.

Therefore, the SC stated that the auction price must be accepted as final and binding on the parties. A sale certificate in line with Rule 9 of the Security Interest (Enforcement) Rules, 2002 was to be issued in favour of the Auction Purchaser subject to deposit of certain remaining sums that had to be paid by it. The Borrower's deposit, as allowed by the HC was to be refunded forthwith.

In the author's opinion, this is a valuable judgment under securitization law for the fact that it protects the interest of a genuine auction purchaser under the Act. Additionally, it recognized the distasteful practice adopted by banks in allowing borrowers to exercise their right to redemption merely because they offer a higher price than a genuine auction purchaser. Finally, it has categorically declared the position of law in respect of a borrower's right to redemption getting extinguished upon a secured creditor making a public notice for auction of the security.

[i] Celir LLP v. Bafna Motors (Mumbai) Pvt. Ltd. and Ors. (Civil Appeal Nos. 5542 – 5543 of 2023) [judgment and order dated 21st September, 2023].

[ii] The coram consisted of Dr. Dhananjaya Y. Chandrachud, C.J.I. and J. B. Pardiwala, J. The judgment was delivered by J. B. Pardiwala, J.

[iii] The term 'right to redemption' essentially means that a mortgagor shall be entitled to ask for the transfer of its security back to itself or to a person it names if it is able to tender the entirety of the mortgage dues to the mortgagee prior to a transfer of such security.

[iv] An application before the DRT under the Act for exercising the right to redemption.

[v] The relevant portion of section 60 of the 1882 Act states as under:

***"Section 60. Right of mortgagor to redeem.*—At any time after the principal money has become [due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage – money, to require the mortgagee (a) to deliver [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],**

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by [decree] of a Court. The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. ... "

[vi] Section 13 (8) of the Act states as under:

"(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets."

[vii] Amme Srisalam v. Union Bank of India, Regional Officer, Guntur, rep. by its Region Head & Deputy General Manager, Andhra Pradesh and Ors. (W. P. No. 11435 of 2021).

[viii] Section 11 of the Enforcement of Security Interest and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016.